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# The changing role of commercial agents

WORKSHOP 1 - DISCUSSION PANEL

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## Notion of commercial agent under the Commercial Agents Directive

Article 1 paragraph 2

For the purposes of this Directive, 'commercial agent' shall mean a **self-employed intermediary** who has **continuing** authority **to negotiate** the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal.



# NEGOTIATE

## Questions referred to the ECJ on the interpretation of Art. 1 para. 2 of the Commercial Agents Directive

- *Trendsetteuse* case, C-828/18 (decision of June 4, 2020): A person must necessarily have the power to change the prices of the goods he sells on behalf of the principal in order to be qualified as a «commercial agent»?
- *Zako* case, C-452/17 (decision of November 21, 2018): Does a person, in order to qualify as an agent, have to carry out his activity outside the principal's premises? Can a person be qualified as an agent even if, in addition to promotion activities on behalf of another person, he or she carries out activities of a different nature?
- Broad interpretation
- The increase of principal's turnover as a consequence of the activity performed by the agent

## The changing role of the commercial agent

- Sectors involved (e.g. food industry)
- Different services: positioning of contractual products in the shuffles, visual merchandising, etc.
- New role: merchandising?
- Italian case law: merchandising  $\neq$  agent (Cass. 1998/2017; App. Milano 09/09/2019; contra Cass. 11369/2014; Trib. Milano 1215/2018; Trib. Cuneo 24/04/2020)
- Possible strategies





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# **The changing role of the commercial agent**

A practical view from Loacker's perspective

## The changing role of the commercial agent – the Norep-case

- Development
  - Direct relationship between principal and customer with regard to orders, i.e. b2b online platforms
  - New services (in addition or instead of) the traditional one
  - Centralised agreements in the food industry
  
- Question:
  - Still an agent («negotiate»)?
  - The calculation of indemnity

## The changing role of the commercial agent – the Norep case

- **Norep case, E-2/21 (EFTA Court)**
  
- Background of the case
  - Norep
  
  - The Norwegian food industry – three large chains, must have agreement with the chain on a central level. Mandatory and voluntary products
  
  - Appeal Court:
    - Agency Act interpretation – necessary to obtain orders
    - Norep did not obtain orders as went directly from customer

## The changing role of the commercial agent – the Norep case

Supreme Court referred two questions to the EFTA Court:

- 1. «Shall the term “negotiate” be interpreted as presupposing involvement with orders from customers to the principal, with the result that the orders may not go directly from customers to the principal?
- 2. If Question 1 is answered in the negative, which factors are relevant in the assessment of whether sales-related activity is to be deemed to be “negotiation”?



## The changing role of the commercial agent – the Norep case

- **Answer to question 1 (not surprisingly)**
- «Negotiate» does not necessarily presuppose the agent's direct involvement with the placing of orders or exclude a scenario in which orders go directly from customers to principal

## The changing role of the commercial agent – the Norep case

- **Answer to question 2:**
- “Sales-related activity should be deemed to be negotiation (...) if it is **specifically undertaken with a view to achieving the conclusion of contracts of sale or purchase of goods by the principal**, and if the agent acts as an **intermediary** between the principal and his customers.”

Other sales-related work

Negotiation

## The changing role of the commercial agent – the Norep case

- The commercial agent must act as an **intermediary** - a link between the customer and the principal, appearing as the principal's representative. The mere provision of sales-related or promotional services will not in itself entail that the person acts as a commercial agent.

## The changing role of the commercial agent – the Norep case

- Up to the national courts to consider all relevant facts
- EFTA Court highlights the importance of the agreement - must assess the respective obligations, for example:
  - Exclusive rights?
  - Whether the purported agent represented, participated in sales meetings, actively pursued increased sales or sought and obtained new clients
- Must look at the agreement and the activities as a whole





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## The changing role of the commercial agent – the Norep case

Other sales-related work

Negotiation

Merchandising (end  
user marketing)

Technical assistance  
to customer

## The changing role of the commercial agent – the Norep case

- **Mixed tasks - Zako**
- To perform other activities does not preclude that person from being classified as a 'commercial agent' provided that that fact does not prevent the former activities from being performed in an independent manner, which it is for the referring court to ascertain.
- Meaning; agent even if performing merchandising, but not agent if only performing merchandising.

## The changing role of the commercial agent – the Norep case

- The Norep case status:
  - Referred back to the Appeal Court (September 2022)
    1. Agent? (mixed role)
    2. Indemnity? (how to consider if Norep has brought new customers or significantly increased business with existing when orders go directly and necessary with a central agreement between principal and chain?)

## **The changing role of the commercial agent – the Norep case**

- Take-home points
- Agent perspective
- Principal perspective





## **Comparative approach**

Do you have any experience on this issue?



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Thank you for your attention and  
participation

Arianna, Lukas and Henrik